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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 987

THE MOTOR CONVOY, INC. AND NATIONAL TRUCKING COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought to set aside an order of the Interstate Commerce Commission.[1] The order granted the petition of Dixie

[1] The Commission's order, Docket No. MC-88300, *Dixie Transport Company, Petition for Modification of Certificate*, October 15, 1963, not reprinted in the jurisdictional statement, is reprinted in the appendix, *infra*, p. 13–15.

Transport Company for a modification of its motor common carrier certificate.

Since October 26, 1939, Dixie Transport has held a certificate authorizing it to transport automobiles and trucks from their places of manufacture in Michigan to destinations in Florida and Georgia, except for certain named counties. In accordance with the Commission's Administrative Ruling No. 75 issued in 1938, Dixie's authority was limited to carrying "initial movements" of automobiles, which were defined as movements of automobiles from manufacturing or assembly plants to destination. "Secondary movements" were defined as all other automobile movements, such as carriage of used, damaged, or repossessed automobiles, or new automobiles moving from places other than manufacturing and assembly plants. These classifications, which applied only to certificates and permits authorizing carriage of motor vehicles, were based upon the then existing pattern of operations among motor carriers transporting automobiles.

The advent in recent years of coordinated motor-rail service—*i.e.*, trailer-on-flat-car service (TOFC) and multilevel rail car service (MLRC)[2]—has resulted in new patterns of distribution of new automobiles

[2] In TOFC service, a demountable highway trailer is placed aboard a railroad flatcar for a portion of the line-haul movement. The complete journey from origin to destination is accomplished partly by motor carrier and partly by rail. In movement by multilevel rail car (a railroad flatcar, equipped with bilevel or trilevel racks, specially designed for the carriage of automobiles), the automobiles ordinarily move by motor carrier to and/or from the origin and destination railheads, and by rail for the line-haul movement.

and trucks. As a consequence, motor carriers that handled initial movements have experienced a sharp decrease in tonnage and revenues.[3] These changes led to the Commission's decision in *National Automobile Transporters Association*, 91 M.C.C. 395 (hereafter *"NATA"*), rendered in response to a petition for declaratory order filed by the Association.[4] The Commission there held that "initial authority", in its historic meaning, restricts a motor carrier to the transportation of automobiles which are picked up by it at the specified points of origin for delivery to the specified destinations described in the certificate. If the traffic moves initially from the point of origin via a railroad, a motor carrier holding "initial authority" between the origin and ultimate destination is not authorized to perform the remaining motor movement from the railhead to the consignee. To participate in such traffic, the motor carrier must obtain appropriate secondary authority. Thus a motor carrier which had previously handled particular automobile traffic in an all-motor movement could not, in such

[3] During the five-year period from 1959 to 1963, the motor carriers' share of new automobile traffic declined from 88 percent to 69.5 percent of the total tonnage; their share of the gross revenue derived from such traffic declined from 83.6 percent to 59.8 percent of the total. *Transport Economics* (monthly comment by Bureau of Transport Economics and Statistics, Interstate Commerce Commission, December 1964) at pp. 1–2.

[4] That proceeding was consolidated with another proceeding initiated by Division 1 of the Commission on its own motion to determine whether Auto Transports Inc. of Oklahoma City had been operating within the terms of its permit by instituting TOFC service.

circumstances, continue to perform the remaining motor portion of a coordinated rail-motor movement of the same traffic.

The Commission also ruled, however, that an affected motor carrier might obtain a modification of its certificate for the limited purpose of permitting it to haul the motor portion of a coordinated rail-motor movement of traffic, which the motor carrier had previously carried over the entire route. This limited modification could be obtained by filing a petition accompanied "by verified statements showing the volume and routing of movements which petitioner transported within a reasonable time prior to the change in movement, and the same data with respect to traffic shipped subsequent to the introduction of rail TOFC and multilevel rail movements" (91 M.C.C. at 415). A modification of the original certificate would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers" (*id.* at 416).[5]

In the instant case, Dixie Transport, having lost all of its Chrysler traffic because of the initiation of coordinated rail-motor service, had, prior to the

[5] Pursuant to that ruling, a total of eleven applications for modification have been filed with the Commission. Five of those applications have been granted, and six have been denied. Two of the decisions which granted modification have been appealed to a district court, *United Transports* v. *United States* (Civil Action No. 65–118, W.D. Okla.); and *United Transports* v. *United States* (Civil Action No. 65–119, W.D. Okla.). Complaints in both cases were filed on April 8, 1965.

NATA decision, sought to obtain general "secondary authority" authorizing it to handle *all* secondary exrail movements from the railheads at Jacksonville, Florida, and Atlanta, Georgia.[6] The Commission denied these applications on the ground that the public convenience and necessity did not warrant the introduction of an additional general "secondary movement" service. After the *NATA* decision was rendered, Dixie filed a petition pursuant to the procedure therein established. Dixie's accompanying affidavits stated that in 1960 Dixie had transported 19,263 automobiles from the Chrysler plants in Detroit, Michigan, to destinations in Georgia and Florida. This traffic produced revenues of $2,959,536.72, amounting to 70 percent of its total revenues.[7] In 1961 Chrysler ceased shipping this traffic via Dixie and shipped it via multi-level rail car service from Detroit to Atlanta, Georgia, and Jacksonville and Miami, Florida, and by October 1961, Dixie had lost all of its Chrysler traffic. Dixie's petition for a modification requested the limited authority to transport the Chrysler traffic from the railheads in Florida and Georgia to its ultimate destination.

Appellants, motor common carriers having secondary authority to serve the railheads in Florida and Georgia, filed protests and requests for oral hearing. They did not controvert the facts stated in Dixie's

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[6] Docket No. MC–88300 (Sub-No. 23), *Dixie Transport Company Extension—Florida*, decided April 18, 1961; and Docket No. MC–88300 (Sub-No. 27), *Dixie Transport Company Extension—Florida*, decided January 22, 1963. These decisions are not reported in full.

[7] Exhibit I to Petition for Modification.

affidavits accompanying its petition. The Commission denied the requests for oral hearing and granted Dixie's petition, authorizing it to transport automobiles from Atlanta, Jacksonville, and Miami to points in Georgia and Florida, "[r]estricted to traffic originating at Chrysler Corporation plants in Detroit, Mich., and having an immediately prior movement by rail."

A three-judge district court affirmed, holding that the "need for the transportation by Dixie had previously been established and Dixie had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way" (J.S. 6a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by the Court. The Commission's order granting Dixie Transport a modification of its certificate was issued pursuant to the procedure established in *National Automobile Transporters Association*, 91 M.C.C. 395, a proceeding to which appellants and the other motor carriers of automobiles were parties. The order was based upon determinations made by the Commission in that case and upon uncontroverted facts alleged in Dixie's petition. The Commission in no way departed from well settled principles of law in relying upon policy determinations made in a prior proceeding to justify granting modification of a certificate of public convenience and necessity.

The Commission's ruling in *NATA* established a procedure whereby a motor carrier possessing "initial authority" might obtain a modification of its operating authority without litigating all issues that may be contested in a certification proceeding under Section 207(a) of the Interstate Commerce Act.[8] That ruling and procedure were prompted by the necessity of affording expeditious relief to motor carriers that had been injured by the diversion of new automobile traffic to the railroads. In view of the effect of the "radically changed circumstances in the transportation industry" and their effect upon the "public interest and the national transportation policy" and the "burden [that] would be placed upon applicants, protestants, and this Commission by the filing of individual motor carrier applications" (91 M.C.C. 415, 416), by motor carriers seeking additional authority, the Commission provided that modifications could be obtained upon a showing that the "initial authority" carrier was only seeking authority to haul from railroad terminals traffic which it had been accustomed to haul from the point of origin before the diversion to rail.

This procedure, while granting relief to adversely affected "initial authority" carriers, was also spe-

[8] Notwithstanding appellants' contrary suggestion (at J.S. 16), the reference in the *NATA* decision to modifications being viewed "in the same light" as an application under Section 207(a) of the Act was, when read in context, plainly not intended to nullify the very purpose of the *NATA* decision—to create simplified and expeditious procedures for dealing with a particular problem. The Commission expressly noted its hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing." 91 M.C.C. at 416.

cifically designed to avoid injury to competing "secondary authority" carriers having authority to serve those railheads where carriers obtaining modifications would receive the automobiles from the railroads. The initial carrier may receive a modification only "to the extent necessary to enable a petitioner to ontinue to participate in the remaining motor movement, and not to encroach on the rights of other existing carriers * * *" (91 M.C.C. 416). By providing for the protection of other carriers serving the same points, the Commission obviated the necessity of taking evidence on the effects that the new authority would have on such carriers.[9]

In relying upon the procedure and policy announced in *NATA* in granting Dixie's petition, the Commission acted in accord with the decision of this Court in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. It was there held that an administrative agency may validly determine in a rule-making proceeding certain issues that may be determinative, in part, of whether a license should be issued in any given case. In that case the Federal Communications Commission had promulgated rules which prohibited any party having five broadcasting licenses from acquiring any additional television station licenses.

[9] Whatever injury would occur to "secondary authority" carriers would result only from the loss of MLRC or TOFC traffic temporarily acquired between the time of the diversion to the rails and the acquisition of the new authority by the initial carrier. The Commission's ruling in *NATA* represents its judgment that, except in special circumstances, over-all injury to the auto transport industry would be less by permitting "initial authority" carriers to retain that traffic.

The contention was made that an application could not be denied by the Commission without a full hearing as to whether the denial of a license on the grounds stated in the rules accorded with the public convenience and necessity. The court held that the hearing requirement of that section did not withdraw "from the power of the Commission the rule-making authority necessary for the orderly conduct of its business" (351 U.S. at 202), and hence a license could be denied on the basis of the rules alone.[10] Similarly, in *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39, this Court recently stated "that the statutory requirement for a hearing under § 7 [of the Natural Gas Act] does not preclude the Commission from particularizing statutory standards through the rule-making process * * *." Cf. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Air Lines Pilots Assn., International* v. *Quesada,* 276 F. 2d 892 (C.A. 2); *Bendix Aviation Corp.* v. *Federal Communications Commission,* 272 F. 2d 533 (C.A.D.C.).

Similarly, the ICC took occasion in the *NATA* proceeding to announce in advance, for the benefit of the automobile transportation industry, the policy it intended to follow, and a procedure for effectuating that

[10] The Commission's rules in *Storer* provided that an applicant might seek a waiver of the rules. The court called attention to the necessity of such flexibility, but stated "that a full hearing * * * would not be necessary on all such applications" (351 U.S. at 205). In the instant case the ICC did not foreclose the possibility of a hearing in an appropriate situation: "* * * it may be that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (91 M.C.C. at 416).

policy, in acting upon modifications of operating authorities filed by motor carriers that were injured by the effect of coordinated motor-rail transportation. This policy was established pursuant to the Commission's general powers "to make all necessary orders * * * and to prescribe rules, regulations, and procedure" in the administration of the Motor Carrier Act, Section 204(a)(6). Since appellants did not controvert the facts alleged by Dixie as to the nature and extent of traffic which it had formerly hauled and which it sought permission to continue to haul ex-rail, there was no necessity for holding a hearing on the unspecified issues that appellants sought to raise. As the district court stated (J.S. 3a): "This court fails to find in the record, however, any statement as to the nature of the testimony which protesting carriers desired to introduce before the Commission, nor does this Court find any resume or statement of the same in the briefs filed in this case."[11]

The order granting the petition was supported by adequate findings and a sufficient statement of the Commission's rationale. The order specifically refers to the uncontroverted facts alleged in Dixie's petition and the verified statements as to the amount and type of traffic that Dixie had hauled prior to the diversion. The order also places explicit reliance on the *NATA* case and the procedure there estab-

[11] The court made clear, however, that the Commission did have an obligation to afford a hearing when "there is relevant testimony that should be considered by the Commission" (J.S. 7a).

lished. In sum, it makes amply clear the facts and policies upon which the Commission proceeded.

Finally, as the Commission's decision in the NATA case makes clear, the action taken in this case is not inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow the traffic" of a particular shipper. *Smith & Solomon Trucking Co.* v. *United States,* 120 F. Supp. 277 (D. N.J.), affirming *Smith & Solomon Trucking Co., Extension,* 61 M.C.C. 748. That principle is intended to prevent a disruption of "the existing competitive situation, since the new carrier's operation in such territory cannot be restricted". *Smith & Solomon Trucking Co., Extension, supra,* at 753. In the instant case, however, the modification granted by the Commission expressly restricts Dixie's operations to traffic formerly hauled, so that no additional competition will be experienced by the existing carriers.

The action of the Commission was fully "responsive to the dynamic character of [the] transportation problems" (*Board of Trade of Kansas City* v. *United States,* 314 U.S. 534, 546) resulting from the application of the unique phraseology previously used in automobile carriers' certificates to the new pattern of coordinated motor-rail service. The procedure followed by the Commission is consistent with this Court's admonition in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, 527, that the public interest requires resolution of such problems through procedures which are both fair and efficient. The lower

court correctly held that the Commission "was authorized" (J.S. 6a), in these circumstances, to grant the limited modification of Dixie's certificate; and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons we submit that the judgment of the court below should be affirmed.

Respectfully submitted.

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APRIL 1965.

APPENDIX

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the — day of ———, A.D. 1963

No. MC–88300

DIXIE TRANSPORT COMPANY

(Whitley City, Ky.)

It appearing, That certificate No. MC–88300 dated October 26, 1939, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of automobiles and trucks from and to the points described in the appendix hereto;

It further appearing, That in its report and order in *National Auto. Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1962), the Commission, *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multilevel rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

1. Petition of Dixie Transport Company, filed January 17, 1963, for modification of certificate.

2. Reply by National Trucking Company, filed May 13, 1963, protestants, embracing a petition for oral hearing.

3. Reply by Florida Convoy, Inc., protestant, filed May 13, 1963.

4. Petition of Florida Convoy, Inc., protestant, filed May 13, 1963, for oral hearing.

5. Reply by Motor Convoy, Inc., protestant, filed May 17, 1963, embracing a petition for oral hearing.

6. Reply by Dixie Transport Company to "protests" and petitions for oral hearing in (2), (4), and (5) above, filed June 10, 1963.

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificate No. MC–88300, dated October 26, 1939, be modified as set forth in the following paragraph;

It is ordered, That upon full compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules of the Commission thereunder Certificate No. MC–88300, dated October 26, 1939, be, and it is hereby modified by adding to the certificate the following:

Automobiles, in secondary movements, in truck-away service: from Atlanta, Ga., and Jacksonville and Miami, Fla., to points in Florida and points in Georgia, except those in Towns, White, Hall, Gwinnett, Rockdale, DeKalb, Clayton, Fayette, Coweta, Heard, Carroll, Douglas, Foulton, Cobb, Forsythe, Dawson, Lumpkin, Union, Fannin, Gilmer, Pickens, Cherokee, Paulding, Haralson, Bartow, Gordon, Murray, Whitfield, Catoosa, Dade, Walker, Chattooga, Floyd, and Henry Counties, Ga.: Restricted to traffic originating at Chrysler Corporation plants at Detroit, Mich., and having an immediately prior movement by rail.

It is further ordered, That in all other respects the petitions in (1), (2), (4), and (5), be, and they are hereby, denied for the reason that no sufficient cause appears (1) for modifying the said certificate except to the extent modified by the first ordering paragraph hereof, or (2) for assigning the matter for oral hearing.

And it is further ordered, That if applicant does not comply with the requirements set forth in the first ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. MCCOY, *Secretary.*

(SEAL)

Authority in certificate No. MC–88300, dated October 26, 1939, sought to be modified.

Truckaway: *Automobiles* and *trucks* from Detroit, Pontiac, Flint, and Lansing, Mich., and Southbend and Evansville, Ind., to points and places in Florida and those in Georgia except Towns, White, Hall, Gwinnett, Rockdale, DeKalb, Clayton, Fayette, Coweta, Heard, Carroll, Douglas, Foulton, Cobb, Forsyth, Dawson, Lumpkin, Union, Fannin, Gilmer, Pickens, Cherokee, Paulding, Haralson, Bartow, Gordon, Murray, Whitfield, Catoosa, Dade, Walker, Chattooga, Floyd, and Henry Counties, Ga., with no transportation for compensation in the reverse direction.

Service herein authorized is subject to the condition that applicant shall not also operate as a private carrier of property by motor vehicle in the transportation in interstate commerce of automobiles and trucks.

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